U.S. Department of the Interior
Office of Inspector General

AUDIT REPORT

OCCUPANCY TRESPASS RESOLUTION, BUREAU OF LAND MANAGEMENT

REPORT NO. 96-I-1265
SEPTEMBER 1996

United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, D.C. 20240

OCT 28 1996

MEMORANDUM

TO: The Secretary

FROM: Wilma A. Lewis
Inspector General

SUBJECT SUMMARY: Final Audit Report for Your Information - "Occupancy Trespass Resolution, Bureau of Land Management" (NO. 96-I-1265)

Attached for your information is a copy of the subject final audit report. The objective of the audit was to determine the effectiveness of the Bureau of Land Management's policies and procedures for resolving occupancy trespass.

We concluded that four of the five Bureau of Land Management resource areas visited were not actively resolving occupancy trespass cases, including occupancy trespass on unpatented mining claims. During fiscal years 1993 and 1994, the four resource areas had identified only 10 and resolved only 14 occupancy trespass cases out of a backlog of over 160 such cases. The Resource Area Managers stated that resolution of occupancy trespass was assigned a low priority because of the cumbersome and costly processes required for resolution, both under the Federal Land Policy and Management Act and Bureau regulations implementing the Surface Resources Act; the concern for the safety of employees involved in trespass cases; and the need to concentrate on higher priority activities. In contrast, the Folsom Resource Area, which had assigned a high priority to resolving occupancy trespass, had identified and recorded 88 new cases of trespass and resolved 107 cases during the audit period. Based on our review, we attributed the success of the Folsom Resource Area to the diligence and commitment of the Resource Area Manager and his staff and their willingness to pursue a combination of methods, including cooperation with local officials and the U.S. Attorney's Office, in resolving occupancy trespass cases.

The Bureau concurred with our recommendations pertaining to regulations for the unlawful use and occupancy of unpatented mining claims by publishing a final rule on this issue. It also concurred with our recommendation to instruct field personnel to work with local law enforcement agencies regarding threats of violence to Bureau employees. However, the Bureau did not concur with our recommendations relating to the resolution of existing trespass cases and the seeking of appropriate legislative changes to reduce, from 12 months to 6 months, the potential prison sentences for occupancy trespass to allow U.S. District

Court judges or U.S. Magistrate judges (with the consent of the defendant) to decide occupancy trespass cases, Based on the response, we revised two recommendations and requested that the Bureau consider the revised recommendations.

If you have any questions concerning this matter, please contact me at (202) 208-5745 or Mr. Robert J. Williams, Acting Assistant Inspector General for Audits, at (202) 208-4252.

Attachment

United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, D.C. 20240

SEP 30 1996

Memorandum

To: Assistant Secretary - Land and Minerals Management

From: Robert J. Williams
Acting Assistant Inspector General for Audits

Subject: Audit Report on Occupancy Trespass Resolution, Bureau of Land Management (No. 96-I-1265)

This report presents the results of our audit of occupancy trespass on lands managed by the Bureau of Land Management. Our audit objective was to determine the effectiveness of the Bureau's policies and procedures for resolving occupancy trespass.

We found that of the five resource areas visited, only the Folsom Resource Area was actively resolving occupancy trespass cases. During the period of our audit, fiscal years 1993 and 1994, the Resource Area had identified and recorded 88 new cases of trespass and resolved 107 cases. Resource Area staff attributed their success to the commitment of the Area Manager, who made occupancy trespass resolution a high priority and assigned responsibility for resolving trespass cases to specific staff. However, the Barstow, Ridgecrest, Ashland, and Grants Pass Resource Areas did not assign a high priority to resolving occupancy trespass and were not systematically identifying, recording, and resolving such cases. For fiscal years 1993 and 1994, these four resource areas had identified only 10 occupancy trespass cases and resolved only 14 cases.

The Area Managers stated that they assigned a low priority to resolving occupancy trespass, in part, because of the cumbersome and costly processes required to resolve such trespass. Under the Federal Land Policy and Management Act of 1976, a willful trespasser on public lands is subject to administrative costs, rents, and fines and may be imprisoned for up to 12 months. The potential 12-month imprisonment entitles the accused trespasser to a jury trial, which is expensive and can create significant delays because of the substantial felony work load in U.S. District Courts. Bureau field officials told us, and we confirmed, that the potential imprisonment would have to be 6 months or less to allow U.S. Magistrate judges or U.S. District Court judges to decide occupancy trespass cases, thereby shortening the process and reducing the costs to the Government.

Occupancy trespass on unpatented mining claims involves additional determinations that can take up to 8 years and cost an average of $11,000 per instance, not including cleanup costs of the land. Under the Surface Resources Act of 1955, the use of land on unpatented claims is limited to "prospecting, mining, or processing operations and uses reasonably incident thereto." However, Bureau regulations implementing the Surface Resources Act do not define "reasonably incident." In addition, the Bureau's surface management regulations implementing the Federal Land Policy and Management Act allow claimants to disturb up to 5 acres of land (notice-level mining) without Bureau approval and without disclosing any planned structures. Accordingly, the Interior Board of Land Appeals has noted that the Bureau's regulations cannot be used to prevent occupancy trespass on notice-level mining claims. In contrast, we noted that the U.S. Department of Agriculture's Forest Service regulations (36 CFR 261) prohibit structures on Forest Service lands without approval.

In addition to the cumbersome processes, Bureau officials at three of the five resource areas visited told us that they were reluctant to enforce occupancy trespass because of their concerns for employee safety. For example, one Federal employee who had been actively involved in occupancy trespass resolution was told that there was a "contract" on his life. In another instance, a Resource Area Manager believed a mining claimant was violent and requested that the local SWAT (Special Weapons and Tactics) team accompany Bureau personnel visiting that claimant.

Although the information was not available for us to establish the amount of revenues that the Government has lost because of occupancy trespass, we found that such trespass created public health and safety hazards, restricted public access, and resulted in a negative image to the mining industry and in cleanup costs of up to $27,000 per instance. Bureau officials told us, and we verified through site visits, of the existence of significant amounts of trash and violations of local building, fire, health, and sanitation codes. We also noted that fences and "No Trespassing" signs restricted public access to rivers and other recreation areas and that significant cleanup needed to be performed. Under current Bureau regulations, claimants disturbing up to 5 acres are not required to post bonds to cover the costs of cleanup. Conversely, the Forest Service can require that occupants post bonds to cover cleanup costs for any surface disturbances, which can be less than 5 acres.

To correct the problems noted, we recommended that the Bureau: (1) develop an action plan to resolve existing cases, including litigating high profile cases; (2) promulgate in their final form the proposed regulations concerning mining occupancy trespass and financial guarantees; (3) consider seeking legislative changes to provide a range of penalties for occupancy trespass cases; and (4) instruct Resource Area Managers to work with local law enforcement agencies, as appropriate, to reduce the threat of violence to Bureau employees investigating occupancy trespass.

In the May 15, 1996, response (Appendix 3) from the Director, Bureau of Land Management, to the draft report, the Bureau concurred with our recommendation (No. 2) to promulgate regulations concerning the unlawful use and occupancy of unpatented mining claims and financial guarantees. Subsequent to the Bureau's response, the final rule regarding the unlawful use and occupancy of unpatented mining claims was published in the July 16, 1996, issue of the *Federal Register. The* Bureau also concurred with our recommendation (No. 4) to work with local law enforcement agencies to reduce the threat of violence to Bureau employees. Based on the response, we considered Recommendations 2 and 4 resolved but not implemented and will refer the recommendations to the Assistant Secretary for Policy, Management and Budget for tracking of implementation.

The Bureau did not concur with the two recommendations (Nos. 1 and 3) regarding the action plan for resolution of occupancy trespass cases and the length of prison sentences for occupancy trespass. Based on the response and on publication of the final rule, we revised Recommendation 1 to request that the Bureau develop an action plan based on criteria established by Bureau management and Recommendation 3 to request that the Bureau consider seeking legislative changes to establish a range of penalties for occupancy trespass up to and including a 12-month prison sentence. Therefore, the Bureau is requested to respond to the revised recommendations, both of which are unresolved. (The status of all the recommendations is in Appendix 5.)

In its response, the Bureau included additional comments, which we incorporated into this report as appropriate. Also, we received an April 24, 1996, memorandum from the Assistant Solicitor, Branch of Onshore Minerals, Division of Mineral Resources, stating that she "did not have objections" to the recommendations made in the report. While we did not include a copy of her comments, they were incorporated into our report as appropriate.

In accordance with the Departmental Manual (360 DM 5.3), we are requesting your written response to this report by December 6, 1996. Your response should provide the information requested in Appendix 5.

The legislation, as amended, creating the Office of Inspector General requires semiannual reporting to the Congress on all audit reports issued, actions taken to implement audit recommendations, and identification of each significant recommendation on which corrective action has not been taken.

We appreciate the assistance of the Bureau in the conduct of this audit.

CONTENTS

INTRODUCTION

BACKGROUND

The Bureau of Land Management is responsible for conserving, managing, and developing 270 million acres of public lands in the United States. In this regard, the Bureau is responsible for identifying cases of trespass, resolving those cases in an equitable and timely manner, and preventing and discouraging future trespass. Occupancy trespass has been identified by the Bureau as a common form of trespass. The Bureau's primary authorities for addressing occupancy trespass are Sections 302(b) and 303(a) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1732 and 1733) and Section 4 of the Surface Resources Act of 1955 (30 U.S.C. 612(a)).

Occupancy trespass occurs when people live or build permanent or semipermanent structures on public lands without authorization.[1] Much of the occupancy trespass occurs on unpatented mining claims.[2] The Mining Law of 1872, as amended (30 U.S.C. 22 *et seq.),* allows U.S. citizens to file claims and prospect for minerals on public lands not closed or withdrawn from mining. To preserve and protect public lands and prevent their undue degradation, the Congress has, over the years, enacted legislation governing the surface use of unpatented mining claims. For example, Section 4(a) of the Surface Resources Act of 1955 (30 U.S.C. 612(a)) limited the development of unpatented mining claims to "prospecting, mining, or processing operations and uses reasonably incident thereto."

As of June 1995, the Bureau had recorded 1,336 cases of occupancy trespass nationwide, with 1,210 of these cases, or 90 percent, being more than 2 years old. The Bureau records occupancy trespass as either realty occupancy trespass or mining occupancy trespass. The type of trespass determines the manner in which the trespass is addressed. The Bureau can address a realty occupancy trespass through administrative actions, civil suit, or criminal prosecution. If the occupant is cooperative or if the trespass is unintentional, the Bureau attempts to resolve the trespass informally through oral or written communication. The Bureau prefers to resolve trespass through informal means because such means are usually quick and inexpensive. If the Bureau suspects that the trespass is intentional or if attempts at informal resolution are unsuccessful, the Bureau may take formal administrative,

[1]The Code of Federal Regulations (43 CFR 2920.1-2), the authorization for which is provided by the Federal Land Policy and Management Act, states that "any use, occupancy, or development of the public lands, other than casual use . . . without authorization . . . shall be considered a trespass."

[2]An unpatented mining claim is one in which the claim holder has the right to explore, develop, mine, and sell locatable minerals such as gold, silver, and copper and to conduct activities reasonably incident to these uses while the United States continues to hold title to the land. This is in contrast to a patented mining claim, in which the claim holder, with a per acre payment to the Government, obtains the title to and exclusive use of the land and to any and all minerals in perpetuity.

civil, or criminal actions. Formal administrative action typically begins with the issuance of a formal trespass decision by the Resource Area Manager and, after a variety of appeals within the Bureau, can culminate in a decision by the Department of the Interior's Board of Land Appeals. An occupant, but not the Bureau, can appeal a decision of the Board to Federal District Court.

The Bureau can also initiate trespass actions through civil suit or criminal prosecution. In a civil action, the Bureau must prove by a preponderance of the evidence that it is entitled to its requested relief, such as restoration of lands. A criminal prosecution, by contrast, requires proof beyond a reasonable doubt that an intentional trespass has occurred. Because of the different standards of proof in civil and criminal actions, if the Bureau first seeks criminal prosecution but is unsuccessful, it can still bring a civil action. The reverse, however, is not true; that is (as a practical matter), a criminal prosecution cannot be maintained after an unsuccessful civil action in the absence of new or additional evidence.

The Bureau generally initiates resolution of a mining occupancy trespass through an administrative process. Specifically, if the trespass cannot be resolved through written and oral communication, the Bureau's resource area conducts a field investigation to determine whether the occupancy is reasonably incident to the level of mining. The resource area is required to notify the occupant by certified mail at least 30 days before the investigation. If it is determined that the occupancy is not reasonably incident to the level of mining, a mineral examiner in the resource area prepares a Surface Use Determination Report to confirm the Bureau's field decision. This report is then reviewed and validated by another mineral examiner in the district or state office. The occupant is informed by letter that the occupancy is not authorized and is given 30 days to vacate the land. If the occupancy is not terminated, the case is referred to the State Director, with a recommendation to initiate a hearing before an administrative law judge[3] in the Office of Hearings and Appeals. Both the claimant and the Bureau can appeal the administrative law judge's decision to the Interior Board of Land Appeals.

OBJECTIVE AND SCOPE

Our audit objective was to determine whether the Bureau was resolving trespass on public lands. Our preliminary fieldwork disclosed that at four of the five sites we visited, the Bureau was not addressing occupancy trespass in a timely manner. Accordingly, we focused our efforts on determining the effectiveness of the Bureau's policies and procedures for resolving occupancy trespass.

To accomplish our objective, we reviewed laws and Federal, Departmental, and Bureau regulations and policies governing the unauthorized use of public lands as

[3] An administrative law judge presides at administrative hearings. The administrative law judge's authority is essentially one of recommendation, but the judge's decision is binding on the claimant and on the Bureau unless appealed and overturned by the Interior Board of Land Appeals.

they pertained to occupancy trespass. We also interviewed officials from the offices identified in Appendix 1 to obtain information and data on the resolution of occupancy trespass. In addition, we reviewed selected case files on occupancy trespass for fiscal years 1993 and 1994 at the five resource area offices. However, because of the inconsistencies in how occupancy trespass cases were coded, we were unable, in many instances, to distinguish between realty occupancy trespass and mining occupancy trespass. Further, we compared the Bureau's regulations, policies, and procedures governing occupancy trespass resolution with those of the U.S. Department of Agriculture's Forest Service to determine consistencies and differences in the agencies' regulations addressing the uses of unpatented mining claims. We also interviewed Forest Service officials to obtain information concerning the success of the Forest Service's pilot program for resolving occupancy trespass at Klamath National Forest in California.

The audit fieldwork was conducted from February through July 1995. This audit was made, as applicable, in accordance with the "Government Auditing Standards," issued by the Comptroller General of the United States. Accordingly, we included such tests of records and other auditing procedures that were considered necessary under the circumstances.

As part of the review, we evaluated the system of internal controls to the extent that we considered necessary. We found that the Bureau had not established the necessary controls to ensure the timely resolution of occupancy trespass. The weaknesses in this area are discussed in the Finding and Recommendations section of this report. If implemented, our recommendations should improve the internal controls in these areas. We also reviewed the Department's Annual Statement and Report, required by the Federal Managers' Financial Integrity Act of 1982, for fiscal years 1993 and 1994 and determined that none of the reported weaknesses were directly related to the objective and scope of our audit.

PRIOR AUDIT COVERAGE

Since 1990, the Office of Inspector General has issued two reports and the General Accounting Office has issued one report concerning occupancy trespass on Bureau-managed lands. The Office of Inspector General also has written a report on hardrock mining site reclamation, which includes some of the same concerns detailed in this audit report. Overall, the audit reports concluded that there were many unauthorized residences on unpatented mining claims and that the Bureau had not allocated sufficient resources to resolve occupancy trespass cases in a timely manner or collected administrative costs, rents, and penalties associated with these trespasses. These reports are synopsized in Appendix 2.

FINDING AND RECOMMENDATIONS

RESOLVING OCCUPANCY TRESPASS

At four of the five resource areas we visited, the Bureau of Land Management was not adequately resolving occupancy trespass. Under the Federal Land Policy and Management Act of 1976, any occupancy on public lands without authorization is considered a trespass, which results in the trespasser being subject to administrative costs, rents, land restoration costs, and civil and criminal penalties. The Surface Resources Act of 1955 authorizes occupancy on unpatented mining claims, provided that the occupancy is "reasonably incident" to the level of mining being undertaken. However, with the exception of the Folsom Resource Area, officials at the resource areas we visited said that they had assigned a low priority to resolving occupancy trespass because the processes required for addressing occupancy trespass under the Federal Land Policy and Management Act and the Bureau's regulations implementing the Surface Resources Act were cumbersome and expensive. In addition, recent threats of violence against Bureau employees have made some Resource Area Managers reluctant to resolve occupancy trespass because of concerns for the safety of their staff. We were unable to establish the monetary impact of not resolving occupancy trespass in terms of revenue loss to the Government because the necessary information was not available at the offices we visited. However, our review disclosed that such trespass resulted in public health and safety hazards; in restricted public access; in a negative image of the legitimate mining industry; and in expensive cleanup costs to the Government, which, according to Bureau estimates, ranged from $2,500 to $27,000 per instance.

Folsom Resource Area

We found that the Bureau's Folsom Resource Area was actively resolving occupancy trespass and was the only area that could provide us with complete case statistics for fiscal years 1993 and 1994. At the beginning of fiscal year 1993, the Resource Area had 153 occupancy trespass cases pending. During fiscal years 1993 and 1994, Resource Area staff identified and recorded 88 new occupancy trespass cases and resolved 107 cases. The staff said their success in resolving trespass cases was the result of their cooperative and diligent efforts and the commitment of the Area Manager, who made trespass resolution a high priority. For example, the Area Manager's systematic approach to resolving trespass included appointing a trespass coordinator to focus on trespass issues; assigning various staff, such as rangers, geologists, and realty specialists, the responsibility for resolving specific trespass cases; and holding the assigned staff accountable for resolving the cases assigned to them. In addition, the Resource Area Manager conducted training classes for other Bureau resource area employees on ways to address and resolve trespass cases.

The Resource Area Manager and his staff used a combination of methods to resolve trespass. For example, they requested county inspections to determine occupant

compliance with county building, health, and safety codes and prepared legal documents for the U.S. Attorney's Office. Of the 25 cases that we reviewed, 10 cases were resolved: 6 through the administrative process and 4 through criminal prosecution after 2 years of attempts to resolve these cases administratively. The Resource Area had addressed the remaining 15 occupancy trespass cases to the extent practicable, with many cases awaiting the completion of actions, such as land surveys by the district or state offices, that were beyond the Resource Area's scope of responsibility. The Resource Area's persistence in attempting to resolve occupancy trespass is illustrated in the following examples:

- The Resource Area used a combination of methods to resolve mining occupancy trespasses along the Merced River in Mariposa County, California. The trespasses involved seven different mining claimants who, in the 1980s, began living on three sites along a section of the river included in a Wild and Scenic River Study Area. Mining activity consisted primarily of dredging, which was occurring only 3 months a year; however, occupancy was occurring year-round. The Area Manager determined that the occupancy was not in compliance with County codes and, from 1986 through 1988, attempted to bring the claimants into compliance. In 1988, notices of noncompliance, including noncompliance with county building, health, and sanitation codes, were issued to the occupants, who appealed the notices to the Bureau's California State Office. When the State Office upheld the notices, the claimants appealed to the Interior Board of Land Appeals, which referred the case back to the Bureau for criminal prosecution. In 1990, a U.S. Magistrate judge[4] dismissed the criminal charges against the claimants because applicable mining regulations (43 CFR 3809) did not provide for criminal sanctions. In 1991, the Bureau consulted with the U.S. Attorney's Office. After subsequent efforts by the U.S. Attorney's Office and the Resource Area staff, the cases were resolved through negotiated settlements in 1993, the claimants vacated the land, and the sites have since been reclaimed as recreation areas.

- Another mining claimant has occupied a site in Mariposa County since at least 1982. From 1982 to 1994, Bureau geologists performed 14 inspections and determined that there was no evidence of mining and that all surface disturbance was related to the occupancy. During this time, the Area Manager attempted to bring the claimant into compliance. For example, in 1989, Bureau officials issued a trespass notice citing the claimant for violating building and sanitation codes and for creating a hazard and public nuisance that resulted in undue degradation of public lands. In 1991, the Resource Area conducted fire safety inspections and determined that the claimant had violated Federal and state fire laws. In 1993, a County building inspection determined that the structures on the claim were substandard for housing purposes and in violation of County building codes. In 1994, the Area Manager requested the assistance of the U.S. Attorney's Office in resolving the case. As of February 1996, an Assistant U.S. Attorney was working on a settlement

[4]U.S. Magistrate judges are appointed by U.S. District Court judges and have the jurisdiction to try persons accused of misdemeanors committed within that judicial district.

agreement whereby the claimant would vacate the land. However, the trespass case was still pending after 13 years of effort by the Resource Area.

- A 1994 realty occupancy trespass in Nevada County involved an individual who camped on Bureau lands, denied other visitors use of the land, and made threats against Bureau employees. The Bureau used the 14-day camping limit on Bureau-managed lands to attempt to resolve the trespass and requested that the Regional Solicitor refer the case to the U.S. Attorney's Office. To help expedite resolution of the case, the Resource Area prepared the legal documents for the U.S. Attorney's Office. In January 1995, the U.S. Attorney's Office negotiated an agreement with the occupant.

Other Resource Areas

The Barstow, Ridgecrest, Ashland, and Grants Pass Resource Areas did not systematically identify, record, and resolve occupancy trespass cases. Bureau officials at these resource areas stated that they did not assign a high priority to identifying new occupancy trespass because the process for resolving trespass was so time consuming and cumbersome that they concentrated on other higher priority activities. The inventory of occupancy trespass cases for fiscal years 1993 and 1994, which includes the Folsom Resource Area for comparison purposes, is presented as follows:

Occupancy Trespass Cases Recorded, Resolved, and Pending at Locations Visited

Resource Area	Cases Pending October 1, 1992	New Cases Opened During Fiscal Years 1993 and 1994	Cases Resolved During Fiscal Years 1993 and 1994	Cases Pending September 30, 1994
Folsom	153	88	107	134
Barstow*	78	0	3	75
Ridgecrest*	78	10	4	84
Grants Pass*	9	0	4	5
Ashland*	3	0	3	0
Total	321	98	121	298

*Bureau officials at these resource areas said that the numbers were understated because they did not document all occupancy trespass cases. Therefore, the numbers do not accurately reflect either the magnitude or the significance of the occupancy trespass problem.

The Grants Pass and Ashland Resource Area Managers said that they did not attempt to resolve occupancy trespass unless the trespassers created other problems, such as excessive resource degradation or health and safety violations, because they did not have the staff and because other priorities, such as timber theft, took precedence. Although Ridgecrest and Barstow Resource Area personnel resolved

some occupancy trespass, they said that their efforts were not always systematic because the process was time consuming and cumbersome.

Resolution Processes. When a realty occupancy trespass is suspected, the Bureau tries to resolve the situation informally by notifying occupants that they can stay on Bureau-managed land for only 14 days. If the occupants exceed the 14-day camping limit, they are issued a citation and notified that they have a right to a jury trial in a Federal District Court. Bureau officials stated that most occupants who were issued citations and did not vacate the land requested a jury trial, which was an expensive and time-consuming process for the Bureau. Meanwhile, the occupants remained on the land. The Federal Land Policy and Management Act, Section 303(a), provides that a person who "knowingly and wilfully" trespasses on public land "shall be fined no more than $1,000 or imprisoned no more than 12 months, or both." Bureau officials told us that this possible 12-month imprisonment created significant delays in resolving occupancy trespass because it entitled the accused trespasser to a jury trials.[5] In addition, as stated by one Resource Area Manager, the U.S. Attorneys are often reluctant to bring occupancy trespass cases before a judge because of the District Court's substantial felony work load. This same Area Manager further stated that the people who are on Bureau-administered lands know that jury cases may never come to trial and "use it [this knowledge] to their advantage." Bureau officials suggested that changing legislation to allow U.S. District Court judges or U.S. Magistrate judges (with the consent of the defendant) to decide certain cases would considerably shorten the process and reduce the Government's expense.

Mining occupancy trespass cases are even more difficult to resolve because mining issues must be addressed before a mining claim occupancy can be declared a trespass and actions initiated to remove the trespasser. Bureau officials told us, and we confirmed, that the process of resolving the mining issues is lengthy and expensive, taking up to 8 years to complete and costing an average of $11,000 per instance, not including the cost of any cleanup.

We believe the primary mining issue that must be addressed is whether the occupancy is "reasonably incident" to the level of mining. The Surface Resources Act (30 U.S.C. 612(a)) limited the use of land on unpatented mining claims to "prospecting, mining, or processing operations and uses reasonably incident thereto." However, the Bureau's regulations (43 CFR 3712. l(a)) do not define when a use, such as an occupancy, is "reasonably incident" to mining. According to the legislative history of the Act, one of the purposes of the Act was to "amend the general mining law to prohibit the use of any hereafter located unpatented mining claim for any purpose other than prospecting, mining, processing, and related activities."

[5]Under the 6th Amendment to the Constitution, any person accused of a crime has the right to a jury trial. However, in *United States v. Nachtigal,* 113 S. Ct. 1072 (1993), the Supreme Court determined that misdemeanors with maximum possible sentences of 6 months or less are "petty" offenses and do not entitle the accused to a jury trial.

In addition, the problems of addressing occupancy trespass on unpatented mining claims are exacerbated by the Bureau's surface management regulations (43 CFR 3809.1-3(a)). Under this section, claimants are allowed to disturb up to 5 acres of land just by filing a notice informing the Bureau of their intent to operate.[6] The regulations (43 CFR 3809.1-3(b)) do not require that the Bureau approve the notices or that claimants disclose any planned structures, including residences. Accordingly, the Bureau is limited in its ability to evaluate the legitimacy of the residences of claimants who disturb 5 acres or less, commonly referred to by the Bureau as "notice-level" mining. Our audit disclosed that much of the occupancy trespass occurs at the notice level.

In the Crawford case (Bruce W. *Crawford et UX, 86* IBLA 350, 392 (1985)), the Interior Board of Land Appeals noted that under present regulations, the Bureau cannot prevent occupancy at the notice level of mining and must react to rather than anticipate the occupancy activities of a claimant. The Board stated:

> We are forced to deal with the regulations as we find them, not as we would have written them. If it was BLM's [Bureau of Land Management's] intent to require its approval prior to the establishment of residency on mining claims, BLM need only amend its regulations so that they reflect such an intent.

In contrast, Forest Service regulations (36 CFR 261.10) specifically prohibit the following:

> Constructing, placing, or maintaining any kind of. . . structure . . . or other improvement on National Forest system land . . . without a special-use authorization, contract, or approved operating plan.

In addition, Forest Service regulations (36 CFR 228.4) provide that claimants wanting to conduct notice-level or plan-of-operation mining activity on Forest Service lands should notify the District Ranger, who has the authority to determine whether the activities involved will likely cause a "significant" surface disturbance. If the District Ranger determines that the disturbance will be "significant," the claimant is required to submit a proposed plan of operations and generally post a reclamation bond. Structures, including residences, are considered surface disturbances and, as such, require the claimant to submit a plan of operations. If the proposed structures are not deemed incidental to the level of mining, the District Ranger does not approve the plan and advises the occupants that they will be in trespass. Forest Service officials stated that by requiring a plan of operations, they can prevent construction or placement of structures, including residences, not authorized by the plan. This enables the Forest Service to more readily address cases of occupancy trespass on both notice-level and plan-of-operation mining activity. For example,

[6]Operations include all activities in connection with prospecting, discovering, and mining mineral deposits.

Forest Service officials told us that the Forest Service practically eliminated occupancy trespass on unpatented mining claims in Klamath National Forest between 1988 and 1995. By applying its existing regulations, the Forest Service reduced occupancy trespass cases from 237 to fewer than 10. While the Bureau's Folsom Resource Area also successfully resolved occupancy trespass cases, it did so in spite of existing regulations. As expressed by officials in the Bureau's Medford District and Grants Pass Resource Area Offices, employees should not have to overcome their own regulations to resolve trespass.

Bureau and Forest Semite officials, Solicitors, and an Assistant U.S. Attorney who prosecutes trespass cases generally agreed that the Bureau's regulations complicated rather than facilitated the resolution of mining occupancy trespass. According to the Assistant U.S. Attorney, the Bureau's regulations themselves prevent the pursuit of occupancy trespass because the regulations do not provide attorneys with a valid legal basis from which to argue in court. The Assistant U.S. Attorney told us that by using Forest Service regulations, she had been successful in removing mining occupants who were in trespass on Forest Service lands. Both Forest Service and Bureau officials stated that occupants evicted from Forest Service lands frequently moved to Bureau-managed lands.

We believe that if the Bureau is to address the increasing problem of both realty and mining occupancy trespass, the Bureau must pursue resolution more diligently. In this regard, the Bureau did initiate actions to address mining occupancy trespass in 1991 and 1992, when it published two sets of proposed regulations: one set addressing mining occupancy trespass and the other set addressing financial guarantees, including bonding, which, if promulgated, could have the effect of reducing the number of unauthorized residences on unpatented mining claims. As of May 1996, the mining occupancy trespass regulations were awaiting Congressional approval, and the financial guarantee regulations were awaiting Departmental and Office of Management and Budget approval. Both sets were awaiting subsequent publication in the Federal *Register* in their final form. We believe that the Bureau should finalize these proposed changes to give it greater control over occupancy trespass on unpatented mining claims. The Bureau should also seek legislative changes for issues that cannot be addressed administratively. Although it is difficult for the Bureau to resolve occupancy trespass under current regulations, the Folsom Resource Area has shown that occupancy trespass cases can be resolved successfully through the commitment of resources.

Employee Safety. Some Bureau officials told us that concerns for employee safety made them reluctant to enforce occupancy trespass, particularly on unpatented mining claims. At three of the five resource areas visited, we were told of threats against Federal employees ranging from verbal abuse to the brandishing of weapons. For example, one resource area employee said that occupants of unpatented mining claims told him that there was a "contract" on his life and that a private investigator had been hired to look into his background. According to the Area Manager, the employee had "pushed for the resolution of various long standing problems . . . involving the illegal mining and production of. . . minerals from unpatented federal

mining claims [and] occupancy trespass."[7] Other employees conducting on-site inspections of an unpatented mining claim were similarly challenged.[8] Based on these threats, the Area Manager initiated a policy requiring employees visiting occupancy trespass sites to be accompanied by a Bureau law enforcement officer. In another instance, the Area Manager requested the local SWAT (Special Weapons and Tactics) team to accompany Bureau personnel dealing with a mining claimant whom the Area Manager believed to be violent. The claimant was later shot and killed by a rival mining claimant.

Impact of Occupancy Trespass

As a result of the time-consuming and expensive processes for resolving trespass and the issue of employee safety, we concluded that four of the five resource areas visited were not adequately resolving occupancy trespass. The effect of continued inaction in resolving occupancy trespass, according to Bureau officials, includes the following areas of concern: public health and safety hazards; restricted public access; a negative image of the mining industry; and expensive Government cleanup costs, ranging from $2,500 to $27,000 per instance.

Public Health and Safety. Occupancy trespass sites are sometimes located in remote locations where county services, such as trash removal, are not available. When occupants do not remove the trash, it continues to accumulate, posing public health and safety hazards. In addition, structures on the sites may be erected without inspections by local building, health, and safety officials. Accordingly, occupants may be in violation of local building, fire, and health and sanitation codes. During our site visits, we noted a ramshackle structure with accumulated trash (see Figure 1), old tires, abandoned autos, old appliances, and broken furniture.

[7] A September 12, 1994, memorandum from the Resource Area Manager to the District Manager.

[8] In a December 13, 1991, memorandum from the Area Manager to the District Manager, the Area Manager stated that the "general tone, accusations, and hostility. . . in conversations both in the field and on the telephone . . , lead me to believe these individuals may pose a peril to our personnel."

Figure 1. A ramshackle structure, surrounded by debris, on an unpatented claim in the Medford, Oregon, area. (Office of Inspector General photograph)

In addition, Bureau employees told us that some occupants carry firearms to prevent Bureau employees and the general public from using public land, thus posing a threat to public safety. In one resource area, there have been at least 12 reported homicides on unpatented mining claims since 1984. In one instance, an argument between two unauthorized occupants over access to their claims resulted in the death of one occupant. The Resource Area Manager stated that he believed that it was "just a matter of time before casual visitors are injured or killed in one of these encounters" and that such "tragedies have been narrowly avoided in the past only because of luck."

Public Access. During our site reviews, we noted that some occupants erected fences (see Figure 2) and "No Trespassing" signs on public land to prevent public access to recreation areas, creeks, and rivers. In addition, the occupancy itself deters the public from using the land.

Figure 2. This gate, erected by a mining claimant, blocks access to public lands near Medford, Oregon. (Office of Inspector General photograph)

Mining Industry. One Resource Area Manager, in a letter to the Director of the Bureau, stated that he had discussed trespass issues with local mining councils and with the executive board of a state mining association. According to the Area Manager, the mining officials stated that they were "increasingly concerned with the negative image of the mining industry that is generated by the trespassers." According to these officials, occupancy of legitimate mining claims was not an issue. The Resource Area Manager stated:

> Most legitimate miners say that requiring authorization for them to live on their claims would be no hardship whatsoever. The large mining companies say they usually don't want employees living on the site of their operations. Small-scale miners say any need to live on their claims would be established in their Plan of Operation.

Cleanup Costs. Once an occupant has vacated the public land, the Bureau is often burdened with the costs of cleanup, which the Bureau has estimated to range from $2,500 to $27,000 per instance. These cleanup costs are associated with unauthorized occupancies at the notice level of mining. Under Bureau regulations, notice-level claimants are not required to post bonds or other financial guarantees to provide for cleanup or reclamation of the lands. Accordingly, the Bureau can either clean up the land using Government funds or attempt to recover the cost of cleanup from the claimants through litigation. Bureau officials said that pursuing litigation was generally not cost beneficial because the claimants, in most cases, do not have the resources to pay. A site in Mariposa County before and after the Bureau's cleanup is shown in Figures 3 and 4, respectively. Cleanup costs for this site, one of three sites that were included in a mining occupancy trespass, were about $12,800. Cleanup costs for these three sites totaled about $27,000.

Figure 3. *Debris and structure left at one of three mining claim sites near the Merced River, in Mariposa County, California, after the claimants were evicted. (Bureau of Land Management photograph)*

Figure 4. The mining claim site near the Merced River shown in Figure 3 after Bureau cleanup and regeneration of the land. (Office of Inspector General photograph)

The Forest Service, unlike the Bureau, generally requires bonding for land surface disturbances deemed to be significant, including those on lands of fewer than 5 acres. As a result of this requirement, officials at Klamath National Forest estimated that they recovered at least 80 percent of cleanup costs.

Subsequent Bureau Actions

On July 16, 1996, the Bureau published in the *Federal Register* the final rule (43 CFR 3715) addressing the unlawful use and occupancy of unpatented mining claims for nonmining purposes. The summary in the *Federal Register* states:

> This rule sets forth the restrictions on use and occupancy of public lands open to the operation of the mining laws that BLM [Bureau of Land Management] administers in order to limit use and occupancy. . . . [The rule also] establishes . . . standards for reasonably incidental use or occupancy, prohibited acts, procedures for inspection and enforcement, and procedures for managing existing uses and occupancies. . . . The rule does not adversely affect bona fide mining operations or alter BLM's regulations in 43 CFR Part 3800 pertaining to them.

Under this rule, all claimants must now obtain Bureau approval for building and occupying structures on unpatented mining claims, even if they are planing to disturb no more than 5 acres of land. As such, implementation of the final rule should reduce the illegal occupancy of unpatented mining claims at notice-level mining. However, the final rule regarding financial guarantees (43 CFR 3809) was not published. We believe that a requirement for financial guarantees, including bonding, would further discourage occupancy trespass on unpatented mining claims by claimants whose primary interest in the land is other than mining.

We also noted that the final rule provides for the Bureau to "request the United States Attorney to institute a civil action in United States District Court" to prevent use or occupancy of the public lands in violation of the regulations. We believe that the use of civil action, as opposed to criminal action, will also help reduce the time and cost to the Government of resolving trespass cases.

Recommendations

We recommend the Director, Bureau of Land Management:

1. Develop an action plan with target dates for resolving identified occupancy trespass cases that are most in need of resolution based on criteria established by Bureau management.

2. Promulgate in their final form the proposed regulations concerning the unlawful use and occupancy of unpatented mining claims and financial guarantees, including bonding.

3. Consider seeking appropriate legislative changes to provide a range of penalties for occupancy trespass up to and including a 12-month prison sentence to allow, when appropriate, U.S. District Court judges or U.S. Magistrate judges (with the consent of the defendant) to decide occupancy trespass cases.

4. Instruct Resource Area Managers to work with local law enforcement agencies, as appropriate, to develop and implement options to reduce the threat of violence to Bureau employees in the performance of their duties.

Bureau of Land Management Response and Office of Inspector General Reply

In the May 15, 1996, response (Appendix 3) from the Director, Bureau of Land Management, the Bureau concurred with Recommendations 2 and 4 and nonconcurred with Recommendations 1 and 3. Based on the Bureau's response we consider Recommendations 2 and 4 resolved but not implemented. Also based on the response, we revised Recommendations 1 and 3 and requested that the Bureau consider the revised recommendations, both of which are unresolved (see Appendix 5).

Recommendation 1. Nonconcurrence.

Bureau Response. The Bureau stated that the recommendation "would divert funding from [core] activities with little guarantee of success" and would create "high profile expectations as well as animosities." The Bureau also stated:

> We feel that the only sustainable approach is to fully integrate management of occupancy into the Bureau's core activities, consistent

> with available finding. Our solution starts by taking a simple and quiet approach, the agency identifies those cases that need management before all others and begins to take the necessary actions . . . without fanfare, without diversions created by publicity and without quotas for litigation. Having started with the first case, if funding allows we move on to the next case and repeat the process until all of the existing cases are finished. We litigate only when appropriate and necessary.

Office of Inspector General Reply. We infer from the response that the Bureau does not consider occupancy trespass a core activity. However, we are not convinced that occupancy trespass is not a core activity for the following reasons. In its 1994, 1995, and 1996 Budget Justifications, the Bureau reported to the Congress that the Bureau's program would:

> Support the Administration's initiatives . . . by . . . maintain[ing] an ongoingp rogram of prevention, detection, and resolution to abate the unauthorized use of the Public Lands. [Emphasis added.]

In addition, the position description for the Bureau's GS-1801-12, Staff Law Enforcement Rangers, which was standardized throughout the Bureau in 1994, states:

> Incumbent is . . . responsible for the development and implementation of Office policies and standards for law enforcement and ranger operations, and unauthorized use which includes detection, prevention, investigation, apprehension and prosecution. [Emphasis added.]

However, because the Bureau implied in its response that trespass abatement was not a core activity, we have revised our recommendation to assist the Bureau with its goal of fully integrating the "management of occupancy into . . . [its] core activities." The revised recommendation incorporates the Bureau's statement of what it believed was a "sustainable approach" to resolving occupancy trespass.

Recommendation 3. Nonconcurrence.

Bureau Response. The Bureau "strongly" disagreed with our recommendation to reduce the potential prison sentences for occupancy trespass from 12 months to 6 months to allow judges to decide occupancy trespass cases. The Bureau stated:

> The "downsizing" of the FLPMA [Federal Land Policy and Management Act]-based penalties . . . appears to be based on the strongly held notion among the BLM [Bureau of Land Management] field personnel that a reduction in FLPMA penalties . . . will automatically result in the elimination of the right to trial by jury.
>
> On a philosophical basis we fail to see the efficacy of this approach to managing occupancy trespass. . . . If we believe that . . . [public]

resources are valuable, then occupancy trespass that results in resource damage should merit greater penalty than a "Class A' misdemeanor, not a lesser one.

Office of Inspector General Reply. We made the recommendation based not only on our review of Bureau regulations but also on discussions with Bureau personnel and an Assistant U.S. Attorney who prosecutes trespass cases because they, and we, believed that the recommendation would provide Bureau field staff with an additional tool in resolving occupancy trespass. By making trespass a misdemeanor (Class B), which carries a penalty of imprisonment of 6 months or less, the right to a jury trial would be eliminated, and defendants would choose to be tried by either a U.S. Magistrate judge or a U.S. District Court judge. As such, the defendants could no longer use a jury trial as a delaying tactic. As to public resources, we agree with the Bureau that they are valuable and should be protected. The intent of our recommendation was to protect these resources because we noted that under the occupancy trespass resolution process at the time of our review, many of these valuable public resources were unprotected, since occupancy trespass was largely unabated.

However, we revised our recommendation based on the Bureau's response and on the publication of the final rule on the unlawful use and occupancy of unpatented mining claims (43 CFR 3715), which we believe should reduce the number of future occupancy trespass cases occurring at notice-level mining, where much of the trespass occurs. Accordingly, we request that the Bureau consider seeking legislative changes to provide for a range of penalties for occupancy trespass up to and including the 12-month prison sentence. We believe that such a range of penalties would give Bureau field personnel greater flexibility in addressing occupancy trespass based on the extent, nature, and severity of the trespass and allow them to resolve the trespass expeditiously, resulting in the removal of the trespasser from public lands. In addition, the revised recommendation would accommodate the Bureau's concern that the maximum penalty should be maintained for the degradation or misuse of valuable public resources.

General Comments

In its response, the Bureau also made several general comments about our description and evaluation of the Bureau regulations pertaining to surface resource management. On July 16, 1996, after the Bureau had submitted its response to the draft report, it published the final rule on use and occupancy of unpatented mining claims, which rendered much of the discussion moot. However, we have included the Bureau's general comments and our reply to provide the respective positions of the Bureau and our office on the problems faced by the Bureau in addressing occupancy trespass at the time of our audit (see Appendix 4).

SITES VISITED AND CONTACTED

Office	Location
Department of the Interior	
Bureau of Land Management	
Headquarters	
Mining Law Administration Office*	Washington, D.C.
Lands Records Office*	Washington, D.C.
National Law Enforcement, Security and Investigations Team*	Boise, Idaho
Idaho State Office*	Boise, Idaho
California State Office	Sacramento, California
Bakersfield District*	Bakersfield, California
Folsom Resource Area	Folsom, California
California Desert District	Riverside, California
Barstow Resource Area	Barstow, California
Ridgecrest Resource Area	Ridgecrest, California
Oregon State Office*	Portland, Oregon
Medford District	Medford, Oregon
Ashland Resource Area	Medford, Oregon
Grants Pass Resource Area	Medford, Oregon
Office of the Solicitor	Washington, D.C.
Regional Solicitor's Offices*	Portland, Oregon Sacramento, California
Department of Justice	
U.S. Attorney's Office*	Fresno, California
Department of Agriculture	
Office of Inspector General*	Washington, D.C.
U.S. Forest Service	
Pacific Southwest Region*	San Francisco, California
Klamath National Forest	Yreka, California
State of California	
Department of Parks and Recreation*	Sacramento, California
State of Oregon	
Division of State Lands*	Salem, Oregon

*Contacted only

PRIOR AUDIT COVERAGE

Since 1989, the Office of Inspector General and the General Accounting Office have each issued two reports addressing aspects of occupancy trespass on lands managed by the Bureau of Land Management. The Office of Inspector General has also written a report on hardrock mining site reclamation, which included some of the main concerns detailed in this report. These reports are as follows:

- The Office of Inspector General report "Survey of Selected Programs of the Alaska State Office, Bureau of Land Management" (No. 90-84), issued in July 1990, reported that the Bureau's Alaska State Office had not resolved over 300 trespass cases at the four district offices visited. As a result, the Government lost an unquantifiable amount of revenues because the State Office was not collecting administrative costs, rents, and penalties associated with trespass cases.

- The Office of Inspector General report "Survey of Selected Programs of the Colorado State Office, Bureau of Land Management" (No. 90-64), issued in April 1990, reported that the Colorado State Office had not attempted to resolve 216 of 247 trespass cases identified on Bureau lands at five resource area offices visited. As a result, the Government lost an unquantifiable amount of revenues by not collecting administrative costs, rents, and penalties associated with trespass resolution.

Based on our recommendations in both reports, the Bureau agreed to take the following actions: develop and implement an overall plan to identify trespass on public lands administered by the Alaska and the Colorado State Offices; allocate sufficient resources to resolve all potential trespass cases; resolve present and future trespass cases in a timely manner; and collect administrative costs, rents, and penalties associated with the trespass. However, at four of the five Bureau offices we visited during our current audit, we found that sufficient resources were not allocated to resolve trespass cases in a timely manner.

- The Office of Inspector General report "Hardrock Mining Site Reclamation, Bureau of Land Management" (No. 92-I-636), issued in March 1992, reported that the Bureau had not adequately implemented procedures to ensure that abandoned hardrock mining sites on Bureau-managed lands were being reclaimed and, as a result, constituted serious hazards to persons, wildlife, and the environment. To correct this condition, the report recommended that the Bureau amend the regulations to require that all hardrock mining operators except casual use operators post financial guarantees with the Bureau commensurate with the anticipated type and size of the operation. As of May 1996, the recommendation was pending resolution at the Department of the Interior.

- The General Accounting Office report "Unauthorized Activities Occurring on Hardrock Mining Claims" (No. GAO/RCED-90-111), issued in August 1990, stated

that despite the restrictions placed on nonmining activities by the Surface Resources Act of 1955, some claimants were using their claims for unauthorized residences. Of 59 sites visited, 33 had unauthorized residences ranging from small, rundown shacks to permanent, more expensive, year-round dwellings. The General Accounting Office recommended that a $100 annual fee (also recommended in a previous report) would reduce the number of invalid, inactive, and abandoned claims and the number of unauthorized activities. In response to the General Accounting Office reports, the Congress, with the passage of Public Law 102-381 in 1992 and Public Law 103-66 in 1993, implemented an annual fee of $100 per claim. However, the legislation exempted miners with 10 or fewer claims from the fee requirements.

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Washington. D.C. 20240

In Reply Refer To:
1245 (320)

Memorandum

To: Assistant Inspector General for Audits

Through: Bob Armstrong MAY 15
Assistant Secretary, Land and Minerals Management

From: Director, Bureau of Land Management

Subject: Response to Office of Inspector General (OIG) Draft Report, "Occupancy Trespass Resolution, Bureau of Land Management", March 1996
Report No. W-IN-BLM-001-95

Thank you for the opportunity to review the draft OIG Report entitled "Occupancy Trespass Resolution, Bureau of Land Management", March 1996 (No. W-IN-BLM-001-95). The attached comments respond to the issues raised in the report as well as the recommendations for corrective action.

We fully support the recommendation to promulgate the final use and occupancy regulations (43 CFR 3715) and the bonding amendments to the surface management regulations (43 CFR 3809) (Recommendation 2). We fully support the concept of working with local law enforcement agencies (Recommendation 4). We believe that BLM personnel with law enforcement responsibility are the appropriate individuals to develop working arrangements with local law enforcement officials.

We cannot support a proposal for stand alone "high profile" trespass abatement that diverts scarce funding from our core programs (Recommendation 1). We believe that the only sustainable approach is to manage mining claim occupancy with the pending regulations. We also cannot support the recommendation for a legislative change that "downsizes" Federal Land Policy and Management Act based penalties in order to make things "easier" (Recommendation 3). We believe that the proposal would be ineffectual and would damage our relationships with the Congress and with our customers.

Once the regulations are promulgated, we will begin our approach to managing occupancy on mining claims. The responsible official is the Assistant Director, Resource Use and Protection.

If you have any questions regarding our response, please contact Gwen Midgette BLM Audit Liaison Officer at 452-7739.

Attachment

Response to Draft OIG Report entitled Occupancy Trespass Resolution,
Bureau of Land Management, March 1996
(No. W-IN-BLM-001-95)

General

Some of the recommendations contained in this report can be accepted by the Bureau of Land Management (BLM). However, we are concerned about much of the material contained in the draft report, particularly, two general areas: the discussion of the BLM's surface management regulations (43 CFR 3809) and the desire to eliminate trial by jury.

Surface Management Regulations - In general we find that the draft report does not adequately describe or evaluate the existing BLM surface management regulations (43 CFR 3809). It simply presents statements attributed to BLM field personnel that the regulations are "cumbersome and expensive" and then uncritically accepts these statements. The report then fails to examine why the regulations are cumbersome and expensive. Do these faults arise from a lack of guidance, are they due to inherent structural failures within the regulation themselves, or is the task of managing the use of property rights granted by the mining law simply a difficult one? All of these questions remain unanswered by your report.

Moreover, the report fails to take note of the purpose of the regulations: prevention of unnecessary or undue degradation pursuant to the mandate in the last sentence of section 302(b) of the Federal Land Policy and Management Act (FLPMA) (43 USC 1701 et seq.). Fulfilling this mandate is somewhat different than simple occupancy trespass abatement, as case law has made clear. The case of Bruce *Crawford, et ux. , 1985,* 92 ID 208, 86 IBLA 350 is the principle case cited by your report. The report cites the case incorrectly (see p. 14) and discusses the outcome of the case with apparent disapproval. The analysis presented by your report misses the point of the case as discussed by the Interior Board of Land Appeals (IBLA)

> "The . . . 'reasonably incident' standard resolves questions as to the permissibility of a use by determining whether or not the use is reasonably incident to the activities actually occurring. . .. The 'unnecessary or undue degradation' (of Section 302(b) of the Federal Land Policy and Management Act) standard comes into play only on a determination that degradation is occurring . . . (T)he inquiry then becomes one of determining whether the degradation occurring is unnecessary or undue <u>assuming the validity of the use</u> which is causing the impact. For, if the use is, itself, not allowable, . . . that use may be independently prohibited as not reasonably incident to mining..."
> (92 ID 208 at 233).

When promulgated after four years of considerable controversy, the BLM's surface management regulations contemplated the management of reasonably incident activities and not the determination of what was reasonably incident. Regulations pertaining to that matter were pre-existing and are found at 43 CFR 3712. These regulations, while primarily informational in nature, address the question of reasonably incidental use, and it is these regulations that the BLM cites in the contest process described on page 3 of the report. This process, while cumbersome is required when a dispute arises as to the facts in a case. This is the same as that outcome of the *Crawford Case*. In Crawford, the IBLA simply provided the mining claimant an opportunity for a hearing on matters of fact. Such hearings are a long-standing procedure within the rules of practice of the Department. The Department chooses to take such care since, as the IBLA pointed out in the *Crawford* Case, 1) a mining claim is property, 2) due process requires that claimants be afforded notice and opportunity for a hearing and 3) any decision to deny occupancy when such is necessary to develop the claim could be tantamount to a taking of the right to mine (see the discussion found at 92 ID 208 at 222).

Further, the draft report appears to make much of the five acre threshold, implying that no controls exist over the operator or occupant. As pointed out by field office comments, the requirements for information submitted with a notice are not different from those submitted with a plan of operations. [see 43 CFR 3809.1-3(b) and 3809.1-5(c)]. Construction of a structure would be a disturbance as contemplated by the regulations and the proponent of the operation would be required to provide the location, nature, and type of building in the submission. Failure to do so, could result in a notice of non-compliance and could lead to the filing of a contest action or a request for a temporary restraining order. In this respect, the BLM's surface management regulations are no different from the Forest Service regulations. (36CFR 228).

With respect to occupancy management under the 36 CFR 228 regulations, your report on page 15 states that these regulations explicitly require prior approval before any structure may be built on a mining claim. As pointed out by a field office comment, these regulations do not explicitly require approval of "occupancy" or the placement of buildings. The regulations have been interpreted by Forest Service offices to find that any occupancy or placement of a building is a significant surface disturbance, which is therefore subject to a plan of operations. Plans of operations are thus subject to an approval by the authorized officer. The essential difference between the 36 CFR 228 regulations and the 43 CFR 3809 regulation is the existence of a "bright, white line" that defines significance. This delineation of significance was a direct result of the rulemaking process.

Trial by Magistrate - Throughout the draft report there is a constant theme of making the resolution of occupancy trespass cases simpler and easier through the "downsizing" of the FLPMA-basedpenalties. This appears to be based on the strongly held notion among the BLM field personnel that a reduction in FLPMA penalties from "Class A" to "Class B" or lesser misdemeanors under Title 18, United States Code will automatically result in the elimination of the right to trail by jury. Cases would be decided by Federal District Court Judges or U.S. Magistrates without the presence of a jury, eliminating a time consuming process. In the context of resolving occupancy trespass, your draft report on page

13 states that the prosecution of a jury trial for a misdemeanor by the U. S. Attorney 's office is unlikely given the District Court's felony workloads. This is the apparent origin of the field officials' belief that trial by jury is an impediment to resolution of the trespass and it should be eliminated through the downsizing of the penalties.

We are pleased to see that as the result of a November meeting between your office and the BLM headquarters staff, your office added the parenthetical remark, "with the consent of the defendant" at all points where trial by magistrate was suggested. This parenthetical remark thereby reflects the provisions of 18 USC 3401(b), which clearly permits the defendant to consent to trial by the magistrate. Those who choose not to consent are allowed to proceed before a District Court judge.

On a philosophical basis we fail to see the efficacy of this approach to managing occupancy trespass. Under the downsizing proposal, trespass on the public lands becomes the functional equivalent of a "dog-off-leash" charge. We do not believe it is appropriate to manage the public's resources in such a fashion. If we believe that these resources are valuable, then occupancy trespass that results in resource damage should merit greater penalty than a "Class A" misdemeanor, not a lesser one.

Recommendation 1. - Develop an action plan with target dates for resolving the occupancy trespass cases identified on the work load priorities established by Bureau offices. The plan should include a targeted number of high profile cases to be pursued through litigation.

Comment - We do not support this proposal for two reasons. First, in an era of declining budgets, the BLM's Director has consistent y stated that the agency must concentrate on its core activities. This proposal would divert funding from those activities with little guarantee of success. Second this proposal creates high profile expectations as well as animosities. We see no reason to inflame either.

We note the existence of a stand-alone occupancy trespass resolution proposal for southern Oregon in the early 1980's. Few traces of this proposal exist today. We feel that the only sustainable approach is to fully integrate management of occupancy into the Bureau's core activities, consistent with available funding. Our solution starts by taking a simple and quiet approach, the agency identifies those cases that need management before all others and begins to take the necessary actions. We do so without fanfare, without diversions created by publicity and without quotas for litigation. Having started with the first case, if funding allows we move on to the next case and repeat the process until all of the existing cases are finished. We litigate only when appropriate and necessary. Finally, we manage new existing occupancy cases with the pending final Use and Occupancy regulations (43 CFR 3715).

Recommendation 2- Promulgate in their final form the proposed regulations concerning the unlawful use and occupancy of unpatented mining claims and financial guarantees, including bonding.

Comment - We support this recommendation and are taking all necessary actions to ensure their publication.

Recommendation 3- Consider seeking appropriate legislative changes to reduce the potential prison sentences for occupancy trespass from 12 to 6 months to allow District Court judges or U.S. Magistrate Judges (with the consent of the defendant) to decide occupancy trespass cases.

Comment - The Bureau strongly disagrees with this recommendation for the reasons discussed in the general discussion of the report. In addition, this proposal is impolitic and likely to create adverse public opinion against the Department and the Bureau.

Recommendation 4- Instruct Resource Area Managers to work with local law enforcement agencies, as appropriate, to develop and implement options to reduce the threat of violence to Bureau employees in the performance of their duties.

Comment - While we support the concept of this recommendation, and often work in concert with local law enforcement, we believe that the proper approach is to utilize the agency's on-board law enforcement capacities. Where necessary, the law enforcement personnel, in particular, the Special Agents-in-Charge should take the lead in developing the necessary arrangements, keeping the field managers informed and in the loop.

BUREAU OF LAND MANAGEMENT GENERAL COMMENTS AND OFFICE OF INSPECTOR GENERAL REPLY

Bureau Comments

The Bureau stated that our report did not "adequately describe or evaluate the existing . . . [Bureau] surface management regulations (43 CFR 3809)." According to the Bureau, the report: (1) did not state why the regulations were "cumbersome and expensive"; (2) described the regulations in this manner "uncritically" based on the word of Bureau field office personnel; (3) did not note that the purpose of the regulations was to prevent "unnecessary or undue degradation"; and (4) "appear[ed] to make much of the five acre threshold, implying that no controls exist over the operator or occupant." The Bureau stated that according to its regulations (43 CFR 3809.1-3(b) and 3809.1-5(c)), "The requirements for information submitted with a notice [five acres or less] are not different from those submitted with a plan of operations."

The Bureau also stated that its surface management regulations "contemplated the management of reasonably incident activities" but did not determine "what was reasonably incident." Rather, according to the Bureau, other regulations (43 CFR 3712) "address the question of reasonably incidental use." The Bureau further stated that Forest Service regulations regarding occupancy trespass (36 CFR 228) "do not explicitly require approval of' occupancy' or the placement of buildings" as stated in our report and "have been interpreted by Forest Service offices to find that any occupancy or placement of a building is a significant surface disturbance, which is therefore subject to a plan of operations."

In addition, the Bureau's response stated that our report discussed the outcome of the Crawford case, "the principal case cited," with "apparent disapproval." The Bureau further stated that the report's analysis "misses the point of the case as discussed by the Interior Board of Land Appeals." According to the Bureau:

> In Crawford, the IBLA [Interior Board of Land Appeals] simply provided the mining claimant an opportunity for a hearing on matters of fact. Such hearings are a long-standing procedure within the rules of practice of the Department. The Department chooses to take such care since, as the IBLA pointed out in the *Crawford* Case, 1) a mining claim is property, 2) due process requires that claimants be afforded notice and opportunity for a hearing and 3) any decision to deny occupancy when such is necessary to develop the claim could be tantamount to a taking of the right to mine.

Office of Inspector General Reply

Occupancy trespass by definition is unauthorized. Our report was not concerned with "occupancy when such is necessary to develop the [mining] claim." Rather, the report addressed what we believed to be the key issues involved in resolving occupancy trespass. Based on our review and discussions with Bureau field personnel who dealt with occupancy trespass issues on a continuous basis, we concluded that the key issues were as follows: (1) Bureau regulations (43 CFR 3809) allow a mining claimant to disturb up to 5 acres of land on unpatented mining claims without Bureau approval and (2) Bureau regulations (43 CFR 3712) do not define the uses that are "reasonably incident" to "prospecting, mining, or processing operations" on unpatented mining claims. Therefore, we did not provide, nor did we need to provide, a detailed description or a general evaluation of the existing surface management regulations (43 CFR 3809) except as they impacted occupancy trespass, which was the subject of our audit.

We did not "uncritically" accept the statements by Bureau field personnel that Bureau regulations (43 CFR 3809 and 3712) were "cumbersome and expensive." Our review of these regulations confirmed the statements made by Bureau field personnel. We found that surface management regulations (43 CFR 3809), by allowing a claimant to disturb up to 5 acres (notice-level mining) without Bureau approval, force the Bureau to react to, rather than anticipate, the occupancy activities of a notice-level claimant. The Bureau cannot approve a structure in advance or use its regulations to resolve mining occupancy trespass. During Congressional hearings held in response to the August 1990 General Accounting Office report (see Appendix 2), the Bureau itself admitted that the process was not satisfactory. At a September 1990 hearing before the Subcommittee on Mining and Natural Resources, House Interior and Insular Affairs Committee, the Bureau Director and the Subcommittee stated that Bureau "field staff need a satisfactory process for administering and enforcing legal requirements." In addition, because the regulations (43 CFR 3712) do not explicitly define "reasonably incident," the Bureau can either take no action or become involved in a lengthy and expensive process, including conducting investigations, surface use determinations, and validity exams, to challenge occupancies. Because the Bureau does not define "reasonably incident," the Government must show, as a matter of law, that a "claimant's residence . . . [is] not reasonably related to mining or attendant operations" (June 29, 1990, memorandum to the Assistant Regional Solicitor, Pacific Northwest Region, from a law clerk on the subject of occupancy trespass on mining claims).

In its response, the Bureau stated, "Requirements for information submitted with a notice are not different from those submitted with a plan of operations." The point of our report, however, was not whether the information requirements were the same but rather that a plan of operations requires approval by the Bureau and a notice does not. Our audit disclosed that most occupancy trespass on unpatented mining

claims occurs at the notice level, or below the 5-acre threshold, and we have modified our report to emphasize this point.

In our review of "the five acre threshold," we compared Bureau regulations (43 CFR 3809) with Forest Service regulations (36 CFR 228) and found that the Forest Service does not make the 5-acre distinction but does allow a District Ranger to determine whether an operation will cause significant surface disturbance, which can be fewer than 5 acres. According to the Forest Service, structures on mining claims are deemed significant surface disturbances and therefore require approval through a plan of operations. In contrast, Bureau regulations (43 CFR 3809.1-3(b)) state, "Approval of a notice, by the authorized officer, is not required," thereby allowing a structure to exist without Bureau approval. (Emphasis added.) We agree that Forest Service regulations implementing the Surface Resources Act (36 CFR 228) do not explicitly require approval of occupancy. However, other Forest Service regulations (36 CFR 261) do prohibit "constructing, placing, or maintaining any kind of . . . structure . . . or other improvement on National Forest system land . . . without a special-use authorization, contract, or approved operating plan. " Accordingly, we have revised our report to include the citation for these regulations (36 CFR 261).

The differences between the regulations of the two agencies as they pertain to occupancy trespass are also noted in the previously cited June 29, 1990, memorandum to the Assistant Regional Solicitor, Pacific Northwest Region, which states:

> BLM's [Bureau of Land Management's] regulations differ [from Forest Service regulations]. The purpose of BLM's surface management regulations is to prevent unnecessary or undue degradation of the surface resources of unpatented mining claims. 43 C.F.R. Section 3809.0-1 (1989). In contrast to the Forest Service regulations, an approved operating plan is required only for operations which will cause a cumulative surface disturbance of more than five acres. 43 C.F.R. Section 3809.1-4 (1989). Operators causing a surface disturbance of five acres or less are required only to notify the agency before commencing operations; approval of the notice specifically is not required. 43 C.F.R. Section 3809.1-3 (1989). [Emphasis added.]

We also reviewed court opinions contained in the Mining Law, 5th Ed., 1995, Cumulative Supplement, that interpret the application of both the Bureau's and the Forest Service's regulations. We found that the courts had interpreted Forest Service regulations to specifically require approval through a plan of operations for structures. For example:

> In *United States v. Langley, 587* F. Supp. 1258, 1266 (E.D.Cal. 1984), the Court held that the claimant's residence is covered by the Forest

> Service regulations and must not exist unless approved under an operating plan.
>
> In *United States v. Burnett*, *750* F. Supp. 1029, 1035 (D. Idaho 1990), the Court held that the maintenance of structures "under the Forest Service's current policies and the law of this circuit is a significant surface disturbance which requires an operating plan." The Court ordered the claimant to remove the structures . . . from the claim because "without the requisite approval by the Forest Service, the structures . . . constitute a trespass upon government property." *Id. at* 1036.

Further, as discussed in our report, the Interior Board of Land Appeals, in handing down the Crawford decision, discussed the difference between the two agencies in light of both the *United States v. Langley* and the Board's decision on Crawford as follows:

> [In the *United States v. Langley]* the operator. . . was expressly advised that in order to obtain authorization for his occupancy, he would be required to show that it was reasonably necessary to the proposed mining activities. . . . In enjoining [the defendant] . . . from further occupancy . . . "the maintenance of a fixed residence by defendant creates a sufficiently significant surface disturbance as to require an approved Plan of Operations pursuant to 36 CFR 228.". . . It seems clear that, were the same regulations applicable to appellants' claims in this appeal [Crawford], an order requiring them to vacate the premises would properly issue, since no approved plan of operation covers their activities. The problem, however, is that the BLM [Bureau of Land Management] regulations are substantially different from those of the Forest Service, and the court precedents applying the Forest Service regulations are, accordingly, not particularly germane.

We do not discuss the outcome of the Crawford case "with apparent disapproval," as stated in the Bureau's response. We support "due process," and our report was not concerned with valid unpatented mining claims. On the contrary, we cited the Crawford case to show that at notice-level mining, the Bureau could not prevent claimants from establishing residencies on mining claims. As the Board stated in the Crawford case (86 IBLA 350, 392 (1985)):

> If it was BLM's [Bureau of Land Management's] intent to require its approval prior to the establishment of residency on mining claims, BLM need only amend its regulations so that they reflect such an intent.

STATUS OF AUDIT REPORT RECOMMENDATIONS

Finding/ Recommendation Reference	Status	Action Required
1 and 3	Unresolved	Respond to the revised recommendations, and provide a plan identifying actions to be taken, including target dates and titles of officials responsible for implementation.
2 and 4	Resolved; not implemented	No further response to the Office of Inspector General is required. The recommendations will be referred to the Assistant Secretary for Policy, Management and Budget for tracking of implementation.

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